Supreme Court, U.S.
FILED
SEP 11 1997
CLERK

No. 97-160

In The

Supreme Court of the United States

October Term, 1996

LATREESE TABB,

Petitioner,

vs.

DILLARD DEPARTMENT STORES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LAWRENCE D. SMITH
Counsel of Record
JENKENS & GILCHRIST,
GROCE, LOCKE & HEBDON
A Professional Corporation
Attorneys for Respondent
1800 Frost Bank Tower
San Antonio, Texas 78205
(210) 246-5000

71995 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED

1. Did the trial court err in granting the Defendant's Motion for Judgment (N.O.V.) on the employment discrimination claim?

2. Does the propriety of the Court of Appeals' action with respect to the intentional infliction of mental distress cause of action depend upon the wrongful resolution of the discrimination claim?

3. Did the Appellate Court err by reversing the trial court's ruling on the intentional infliction of mental distress claim?

4. Do the rulings of the trial court and the Court of Appeals conflict with a Supreme Court decision, conflict with decisions of other Courts of Appeal, or are they errors which so far depart from the usual and accepted course of judicial proceedings, or sanctions such a departure by the trial court, that it calls for an exercise of this court's power of supervision?

LIST OF PARTIES

Petitioner:

Latreese Tabb

Respondent:

Dillard Department Stores, Inc.

Respondent has no parent companies. Respondent has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Denying the Writ	2
I. Petitioner Seeks Review Merely Of Sufficiency Of Evidence Determinations Made By Lower Courts.	2
II. The Fifth Circuit Correctly Determined That The Evidence Did Not Satisfy The Standard For Outrageous Conduct Under Texas Law.	3
III. The Fifth Circuit's Decision Does Not Openly And Directly Conflict With Any Relevant Decisions Of This Court Or The Decisions Of Other United States Courts Of Appeals.	6

Contents

		Page
IV.	The Present Matter Is, Because Of Other Factors, Not Appropriate For The Granting Of The Petition For Writ Of Certiorari.	9
	A. The Fifth Circuit Correctly Affirmed Granting Of Respondent's Motion For Judgment As A Matter Of Law On Petitioner's Race Discrimination Claim.	9
	B. This Court Has Previously Denied Certiorari In Cases Involving Similar Claims.	9
	C. Petitioner Seeks Review Of Interpretation Of State Law.	10
	D. *Hicks*' Decision Does Not Compel Result Different From Fifth Circuit's Opinion. ..	11
Conclusion		12

TABLE OF CITATIONS

Cases Cited:

Beiser v. Tomball Hosp. Auth., 902 S.W. 2d 721 (Tex. App. – Houston [1st Dist.] 1995, *writ denied*) 4

Cook v. Fidelity Investments, 908 F. Supp. 438 (N.D. Tex. 1995) 4

Contents

	Page
Gearhart v. Eye Care Centers of America, Inc., 888 F. Supp. 814 (S.D. Tex. 1995)	4
Halbert v. City of Sherman, Tex., 33 F.3d 526 (5th Cir. 1994)	5
Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2511 (1997)	10, 11
Ledesma for Ledesma v. Dillard Dept. Stores, Inc., 818 F. Supp. 983 (N.D. Tex. 1993)	5, 6
Mattix-Hill v. Reck, 923 S.W. 2d 596 (Tex. 1996)	6
Ryther v. KARE 11, 108 F.3d 832 (8th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2510 (1997)	8, 9, 10
Sebesta v. Kent Electronics Corp., 886 S.W. 2d 459 (Tex. App. – Houston [1st Dist.] 1994, *writ denied*)	5, 6
Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (3rd Cir. 1996) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2532 (1997)	8, 10
St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L. Ed. 2d 407 (1993)	6, 7, 8, 9, 11
United States v. Ivy, 973 F.2d 1184 (5th Cir. 1992), *cert. denied*, 507 U.S. __, 123 L. Ed. 2d 455 (1993)	6

Contents

	Page
United States v. Johnston, 268 U.S. 220 (1925)	2
Wardlaw v. Inland Container, Corp., 76 F.3d 1372 (5th Cir. 1996)	7
Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991)	4
Wornick Co. v. Casas, 856 S.W. 2d 732 (Tex. 1993) ...	5
Rule Cited:	
Fed. R. Civ. P. 50	11

OPINIONS BELOW

Petitioner included in the Petition for Writ of Certiorari transcriptions of the relevant opinions by the trial court and the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF JURISDICTION

Respondent agrees that this Court has jurisdiction over this matter, except that Respondent asserts that the decision of the United States Court of Appeals for the Fifth Circuit does not directly and clearly conflict with any decisions of this Court or other United States Courts of Appeals.

STATUTORY PROVISIONS INVOLVED

The key statutory provisions of Title VII have been adequately set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In addition to information identified by Petitioner, Respondent includes the following information. After Petitioner rested in the trial court, Respondent moved for judgment as a matter of law based, in part, on the fact that Petitioner had not established a prima facie case of discrimination on the basis of race. The trial court carried this Motion. Defendant renewed this Motion at the close of all evidence. Contrary to Petitioner's assertion in Point One in the Petition for Writ of Certiorari, Respondent raised the issue of pretext in its Brief for Cross-Appellee in the Fifth Circuit. Respondent specifically argued that the trial court properly granted Respondent's Motion for Judgment on Petitioner's race discrimination claim because Petitioner had presented no evidence contradicting the series of events leading to Petitioner's termination. Respondent also

argued that Petitioner presented no evidence that the series of events leading to Petitioner's discharge were not the factors which motivated Respondent to discharge Petitioner.

REASONS FOR DENYING THE WRIT

I.

PETITIONER SEEKS REVIEW MERELY OF SUFFICIENCY OF EVIDENCE DETERMINATIONS MADE BY LOWER COURTS.

Petitioner's First Point provides "Did the trial court err in granting the Defendant's Motion for Judgment (N.O.V.) on the employment discrimination claim?" Petitioner's First Point basically requests this Court to review the sufficiency of evidence determinations made by the trial court in the first instance and by the Fifth Circuit on appeal.

Certiorari is not granted to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). Petitioner requests this Court to engage in a detailed fact-based review of the record to determine whether the trial court erred in determining that the evidence was insufficient to support the jury's verdict on Petitioner's employment discrimination claim. Petitioner's First Point also will require that the Fifth Circuit's review of the evidence in determining its insufficiency to support the jury verdict on the race discrimination claim be examined. Petitioner seeks review of evidence sufficiency determinations already made by two courts. In essence, Petitioner requests this Court to review the entire record and conduct its own sufficiency of evidence review.

Petitioner's request for review does not present a situation where the lower courts have applied the incorrect legal standard

in reaching a decision. Even if review of the trial court's decision was appropriate, the trial court in its decision on Respondent's Motion for Judgment cited to the appropriate Fifth Circuit standard for a sufficiency of evidence review. Further, in reaching its conclusion, the trial court facially adhered to the appropriate legal standard by concluding that there was no conflict in substantial evidence regarding the race discrimination claim. At best, Petitioner seeks this Court to review an alleged misapplication of an appropriately cited standard.

The Fifth Circuit's opinion contains no indication that it did not apply the appropriate standard of law in determining that the judgment, other than the judgment on the intentional infliction claim, should be affirmed in all respects. Further, Respondent's challenge in its Motion for Judgment to the existence of a prima facie case as well as Respondent's argument in Cross-Appellees' Brief that no evidence existed to support a finding of pretext provide independent support for the Fifth Circuit's affirmance of the trial court's decision on the race discrimination claim.

II.

THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT THE EVIDENCE DID NOT SATISFY THE STANDARD FOR OUTRAGEOUS CONDUCT UNDER TEXAS LAW.

Petitioner claims that the Fifth Circuit erred in reversing the trial court's denial of Respondent's Motion for Directed Verdict and Motion for Judgment as a Matter of Law on Petitioner's state law intentional infliction of emotional distress claim. Petitioner claims in Point Two that the allegedly erroneous decision on Petitioner's race discrimination claim produced an erroneous decision on the state law intentional infliction claim because a finding of discrimination would support the tort claim.

In Point Three, Petitioner urges review of the Fifth Circuit's determination on the state tort claim because sufficient evidence allegedly existed to support the jury verdict for Petitioner on the intentional infliction claim.

Petitioner's arguments regarding her state law intentional infliction claim are not well founded because the Fifth Circuit correctly determined that insufficient evidence existed to support the jury's finding on the state law tort. Petitioner's argument that an erroneous decision on the discrimination issue resulted in an erroneous determination on the intentional infliction issue assumes that, under Texas law, a finding of discrimination constitutes a finding of outrageous conduct necessary to support the intentional infliction tort. However, courts applying Texas law have rejected the notion that discrimination constitutes outrageous conduct. In *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991), the Fifth Circuit noted that even conduct which may rise to the level of illegality does not, except in the most unusual circumstances, constitute outrageous conduct. The Fifth Circuit observed that the mere violation of the Age Discrimination Employment Act of 1967 did not constitute outrageous conduct. *Wilson v. Monarch Paper Co.*, 939 F.2d at 1143-45. Other courts applying Texas law have noted that the violation of anti-discrimination or anti-retaliation statutes does not constitute outrageous conduct. *See Cook v. Fidelity Investments*, 908 F. Supp. 438, 440-41 (N.D. Tex. 1995) (Allegations of intentional infliction of emotional distress which were duplicative of race discrimination claim did not give rise to intentional infliction claim); *Gearhart v. Eye Care Centers of America, Inc.*, 888 F. Supp. 814, 819-23 (S.D. Tex. 1995) (Intentional infliction claim which was based on same facts as sex harassment and retaliation claim failed, in part, because conduct was not outrageous); *Beiser v. Tomball Hosp. Auth.*, 902 S.W. 2d 721, 725 (Tex. App. – Houston [1st Dist.] 1995, *writ denied*) (Allegation that company's action violated

whistleblower statute, even if true, did not, as matter of law, constitute extreme and outrageous conduct); *Sebesta v. Kent Electronics Corp.*, 886 S.W. 2d 459, 462-63 (Tex. App. – Houston [1st Dist.] 1994, *writ denied*) (Violation of statute protecting jurors from retaliation in employment not outrageous). Therefore, Petitioner's assertion that a different decision on the race claim would have resulted in a different determination on the state law intentional infliction claim is not supported by Texas law.

Petitioner asserts in Point Three that the Fifth Circuit erroneously concluded that the evidence did not meet the standard of outrageous conduct required under Texas law to support an intentional infliction claim. Petitioner claims that a series of events which occurred at the time of her discharge, and such events are identified in her Petition for Writ of Certiorari, were sufficient to support the jury's finding and, therefore, the Fifth Circuit's decision constituted error requiring intervention by this Court.

The Fifth Circuit correctly determined that the trial court erred in denying Respondent's Motion for Directed Verdict and Motion for Judgment as a Matter of Law because the evidence did not meet the standard for outrageous conduct under Texas law. Specifically, each of the acts or conduct claimed by Petitioner to constitute outrageous conduct, or acts similar to them, have previously been determined not to constitute outrageous conduct under Texas law. Escorting discharged employees from the work premises does not constitute outrageous conduct. *Wornick Co. v. Casas*, 856 S.W. 2d 732, 735 (Tex. 1993); *Sebesta v. Kent Electronics Corp.*, 886 S.W. 2d 459, 464 (Tex. App. – Houston [1st Dist.] 1994, *writ denied*). Reporting an individual to the police and/or having that person arrested does not constitute outrageous conduct. *Halbert v. City of Sherman, Tex.*, 33 F.3d 526, 529 (5th Cir. 1994); *Ledesma for*

Ledesma v. Dillard Dept. Stores, Inc., 818 F. Supp. 983, 985 (N.D. Tex. 1993). Searches incident to lawful arrest are legal. *See, e.g., United States v. Ivy*, 973 F.2d 1184, 1187 (5th Cir. 1992), *cert. denied*, 507 U.S. __, 123 L. Ed. 2d 455 (1993). Petitioner's claim that the timing of her arrest constituted outrageous conduct under Texas law has been rejected. *See Mattix-Hill v. Reck*, 923 S.W. 2d 596, 598 (Tex. 1996); *Sebesta v. Kent Electronics Corp.*, 886 S.W. 2d at 463-64 (No outrageous conduct even though employee alleged, *inter alia*, that exit parade was arranged for busiest part of day). Further, the evidence established that the Petitioner received favorable treatment during the process of her arrest. Given the status of the evidence and the law, the Fifth Circuit correctly determined that the trial court erred in failing to grant Respondent's Motion for Judgment and Motion for Directed Verdict on Petitioner's state law intentional infliction of emotional distress claim.

III.

THE FIFTH CIRCUIT'S DECISION DOES NOT OPENLY AND DIRECTLY CONFLICT WITH ANY RELEVANT DECISIONS OF THIS COURT OR THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

Petitioner asserts that the trial court's and Fifth Circuit's decisions conflict with a previous decision of this Court. Specifically, Petitioner claims in Point Four that the decision of the trial court and Fifth Circuit conflict with this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L. Ed. 2d 407 (1993). Petitioner further asserts that there is a conflict in the Courts of Appeals concerning the proper interpretation of *Hicks* and that this Court should address such conflict.

The Fifth Circuit's opinion affirming the judgment on

Petitioner's race claim does not openly and directly conflict with any decisions of this Court. Petitioner claims that the conflict occurs because the jury was not allowed to infer discrimination even though the trial court noted that there was evidence of pretext. Petitioner apparently assumes that the Fifth Circuit's decision conflicts with *Hicks* because, according to Petitioner, the trial court's decision conflicts with *Hicks*.

Nothing in the Fifth Circuit's single line affirmance on the race discrimination issue compels this conclusion. While the *trial court* did make a statement concerning the existence of evidence of pretext, the *Fifth Circuit* was not bound by the trial court's observation concerning the status of the evidence of pretext. In reviewing a district court's disposition of a motion for judgment as a matter of law, the Appellate Court applies the same test as the district court without any deference to the district court's decision. *Wardlaw v. Inland Container Corp.*, 76 F.3d 1372, 1375 (5th Cir. 1996). The Fifth Circuit neither specifically adopted the trial court's statement that there was evidence sufficient to support a finding of pretext nor concluded that there was evidence of pretext. The Fifth Circuit, exercising its power to review sufficiency of evidence issues, reviewed the evidence and concluded that the evidence was not sufficient to support the jury's verdict on the discrimination claim. Petitioner's assumption that the Fifth Circuit's decision must conflict with *Hicks* is also not compelled simply by the Fifth Circuit's decision since Respondent challenged the existence of evidence to support the elements of a prima facie case and the existence of any evidence of pretext, both matters which provide independent basis for the Fifth Circuit to affirm the judgment on the discrimination claim.

Additionally, the Fifth Circuit's decision is consistent with *Hicks* because of the lack of evidence of all elements of a prima facie case. To the extent that *Hicks* even applies to the review of

a jury verdict, the portion of the *Hicks* decision relied upon by Petitioner dealing with the quantum of evidence of pretext needed to support a finding of discrimination requires both the fact finder's disbelief of the reasons put forth by the employer, particularly if disbelief is accompanied by a suspicion of mendacity, and the elements of the prima facie case. *Hicks*, 509 U.S. at 511. *See also Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1071 (3rd Cir. 1996) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2532 (1997) (Jury's determination of pretext together with evidence supporting prima facie case will sustain finding of intentional discrimination); *Ryther v. KARE 11*, 108 F.3d 832, 837 (8th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2510 (1997) (Elements of prima facie case accompanied by evidence of pretext and disbelief of the defendant's proffered explanation may permit jury to find for the plaintiff.) In the present case, a detailed review of the record establishes that no evidence was presented concerning Petitioner's replacement or whether her job was held open following her discharge. Since the record is devoid of any evidence of this element of Petitioner's prima facie case, and since Respondent challenged the existence of a prima facie case in its Motion for Judgment at the close of Petitioner's case, it cannot be said that the Fifth Circuit's decision directly and openly conflicts with *Hicks*.

For the same reasons stated above, the Fifth Circuit's decision also does not openly and directly conflict with any opinions of another Court of Appeals. Nothing on the face of the opinion conflicts with the opinions of other Courts of Appeals. Further, Petitioner's assertion that the decision conflicts with other Courts of Appeals is erroneous since Respondent challenged the existence of evidence to support the elements of a prima facie case and the existence of any evidence of pretext, both which would provide under any Courts of Appeals' decisions independent grounds to affirm the judgment on the discrimination claim.

IV.

THE PRESENT MATTER IS, BECAUSE OF OTHER FACTORS, NOT APPROPRIATE FOR THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI.

In addition to the reasons indicated above, there are other factors about this case which make granting of the Petition for Writ of Certiorari inappropriate. These factors are such that the Petition for Writ of Certiorari should be denied.

A. The Fifth Circuit Correctly Affirmed Granting Of Respondent's Motion For Judgment As A Matter Of Law On Petitioner's Race Discrimination Claim.

The Fifth Circuit correctly affirmed the trial court's granting of judgment as a matter of law on Petitioner's race discrimination claim. While the Fifth Circuit's opinion on appeal contains no specific analysis regarding this claim, the Fifth Circuit's own independent analysis of the evidence would establish that there was no evidence sufficient to support a finding of pretext. Further, a review of the record would establish that there was no evidence sufficient to support a finding that Respondent discharged the Petitioner because of her race. Therefore, the Fifth Circuit correctly affirmed the granting of judgment as a matter of law on Petitioner's race discrimination claim.

B. This Court Has Previously Denied Certiorari In Cases Involving Similar Claims.

Petitioner cites a claimed conflict in the Circuit Courts concerning the application of *Hicks* requiring this court to review the Fifth Circuit's decision. However, this Court has recently denied Petitions for Writs of Certiorari on three occasions on cases dealing with similar issues. *See Ryther v. KARE 11*, 108

F.3d 832 (8th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2510 (1997); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3rd Cir. 1996) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2532 (1997); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2511 (1997). Each of these Circuit Court decisions contain detailed analysis of facts and law, including in some instances dissenting opinions, from which this Court could determine whether there was any conflict with its previous decisions warranting review. Further, these detailed opinions provided sufficient analysis from which the Court could determine whether a conflict existed on an important issue among the United States Courts of Appeals or whether there was an important question of Federal law which should be settled by the Court. In the present case, the Fifth Circuit's decision contains no analysis above or different from that offered in the above cases and adds nothing to the jurisprudence on this issue which would justify the granting of Petitioner's Writ of Certiorari.

C. Petitioner Seeks Review Of Interpretation Of State Law.

In Points Two and Three, Petitioner requests this Court to review the Fifth Circuit's interpretation and application of Texas tort law. Petitioner requests this Court to conduct a sufficiency of evidence examination to determine whether the evidence introduced at trial was sufficient to establish the outrageousness element of the Texas common law tort of intentional infliction of emotional distress. Petitioner cites to no specific conflict between the Fifth Circuit's decision and a decision of a state court in Texas. Petitioner cites to no conflicting decisions between the Fifth Circuit and another United States Court of Appeals applying Texas law. Given that Petitioner cites no such conflicts, the issues concerning Petitioner's state law tort claim are particularized to this individual case and are not of sufficient

importance beyond the parties in this case to warrant the granting of the Petition for Writ of Certiorari.

D. *Hicks'* Decision Does Not Compel Result Different From Fifth Circuit's Opinion.

Petitioner argues that the trial court and the Fifth Circuit failed to properly apply this Court's decision in *Hicks* and that this failure constituted error warranting review by this Court. Petitioner's argument is flawed because it assumes that this Court's decision in *Hicks* controls the present case. *Hicks* did not involve a case regarding a jury trial, a verdict for plaintiff or the review of a verdict for the plaintiff. *Hicks* held that the employee was not entitled to judgment as a matter of law where the trier of fact, the district judge, disbelieved the employer's proffered reasons for demotion and discharge. Therefore, *Hicks* decided nothing about decisions under Fed. R. Civ. P. 50. *See Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 440-442 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2511 (1997).

Additionally, Petitioner interprets *Hicks* too narrowly. Interpreting *Hicks* as suggested by Petitioner would completely remove Title VII's requirement of proof of intentional discrimination. *See St. Mary's Honor Center v. Hicks*, 509 U.S. at __, 125 L. Ed. 2d at 416. Title VII would become nothing but a cause of action for perjury and would permit juries to substitute for a finding of intentional discrimination merely a finding that there was evidence that the employer's explanation of the adverse action was unbelievable, two matters cautioned against in *Hicks*. *St. Mary's Honor Center v. Hicks*, 509 U.S. at __, 125 L. Ed. 2d at 421, 425. Applying Petitioner's interpretation of *Hicks* would also be contrary to the actual language of Title VII and its 1991 amendments requiring that discrimination be a motivating factor in employment decisions. Therefore, granting review would be inappropriate.

CONCLUSION

Respondent Dillard Department Stores, Inc. respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

LAWRENCE D. SMITH
Counsel of Record
JENKENS & GILCHRIST,
GROCE, LOCKE & HEBDON
A Professional Corporation
Attorneys for Respondent
1800 Frost Bank Tower
San Antonio, Texas 78205
(210) 246-5000